BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal By	)	SPB Case No. 25506
	)	
GORDON J. OWENS	)	**BOARD DECISION**
	)	(Precedential)
From dismissal from the position of State Traffic Officer, California Highway Patrol at Santa Ana	)	**NO. 92-11**
	)	July 13, 1992

Appearances: Anthony M. Santana, Attorney, California Association of Highway Patrolmen, representing appellant, Gordon J. Owens; Marybelle Archibald, Deputy Attorney General, representing respondent, California Highway Patrol

Before Carpenter, President; Stoner, Vice-President; Burgener and Ward, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Gordon J. Owens (appellant or Owens) from dismissal from his position of State Traffic Officer, with the California Highway Patrol (CHP).

The ALJ modified the dismissal to a suspension for one year, finding the case identical to the case of Bobby J. Lee (1988) SPB Case No. 22750, a non-precedential decision of the Board rendered in another CHP case where the Board had modified a dismissal to a one-year suspension. Recognizing that the Bobby J. Lee case was non-precedential, and despite her opinion expressed in the Proposed Decision that dismissal was warranted, the ALJ nevertheless felt bound to follow the Board's decision in that case, in which a State

Traffic Officer "admit[ted] marijuana use, [was] cooperative with investigators and [sought] professional help to rid himself of the habit."

After review of the entire record, including the transcripts, the written briefs submitted by the parties, and having heard oral arguments, the Board finds that the ALJ's findings of fact are free from prejudicial error. We are also in substantial agreement with her conclusions of law, and adopt her decision as our Precedential Decision, with the exception of the discussion on penalty and application of the Bobby J. Lee case. We find the penalty of dismissal should be sustained for the reasons set forth below.

DISCUSSION

When performing its constitutional responsibility to "review disciplinary actions" [Cal. Const. Art. VII, section 3 (a)], the Board is charged with rendering a decision which, in its judgment, is "just and proper." (Government Code section 19582). One aspect of rendering a "just and proper" decision involves assuring that the discipline imposed is "just and proper." In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion. (See Wylie v. State Personnel Board (1949) 93 Cal. App.2d 838). The Board's discretion, however, is not unlimited. In the seminal case

of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

> While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion which is, in the circumstances, judicial discretion. (Citations) (15 Cal.3d at 217-218).

In exercising its judicial discretion in such a way as to render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id.)

Harm or potential harm to the public service is almost certain to exist in a case where the employee's off-duty misconduct is of such a nature that it causes discredit to the employer or the employment within the meaning of Government Code section 19572(t).

The courts have consistently recognized that peace officers bring discredit to their employment under Government Code section 19572(t) by violating the laws they are employed to enforce. In Constancio v. State Personnel Board (1986) 179 Cal.App.3d 980, an appellate court held that a group supervisor employed by the

California Youth Authority was properly dismissed based on his conviction of driving under the influence of PCP. In Parker v. State Personnel Bd. (1981) 120 Cal.App.3d 84, the same court affirmed the dismissal of a group supervisor employed by the California Youth Authority based on his possession of a large amount of marijuana, noting the irreconcilability of the appellant's behavior and his job. In Hooks v. State Personnel Bd. (1980) 111 Cal. App.3d 572, a court affirmed the dismissal of a correctional officer who had possessed marijuana and hashish. In all three cases, the appellate courts found the penalty of dismissal not clearly excessive.

In the instant case, appellant admitted that he would go to bars, strike up conversations with different people, and pay them approximately $25.00 for an eighth of an ounce of marijuana. The record established that at the time of the incidents at issue, selling marijuana was a felony and purchasing it a misdemeanor. Thus, appellant was seeking out others and encouraging them to commit a felony, while committing a misdemeanor himself in the process. The harm to the public service and potential harm of such misconduct by a State Traffic Officer is serious.

The case of Warren v. State Personnel Board (1979) 94 Cal. App.3d 95 is particularly instructive in assessing the harm to the public service resulting from appellant's behavior in the case

under consideration. In the Warren case, a California appellate court noted:

> A law enforcement agency cannot permit its officers to engage in off-duty conduct which entangles the officer with lawbreakers and gives tacit approval to their activities. Such off-duty conduct casts discredit upon the officer, the agency and law enforcement in general. (94 Cal.App.3d at 106)

Appellant argues, and the ALJ found, that prior decisions of the Board, in cases where an employee was charged with drug use, compel a different result. Preliminarily, we note that Proposed Decisions of the ALJs, even if adopted by the Board, do not automatically have binding precedential effect. The Board may choose to accord precedential effect to a Proposed Decision of an ALJ [See e.g. In the Matter of the Appeal by Leah Korman (1991) SPB Dec. No. 91-04] or to one of its own decisions by specifically designating the decision as precedential. (Government Code section 19582.5) If, however, a decision is not designated as precedential, it may be cited only as persuasive, not binding, authority.

None of the decisions cited by appellant were designated as precedential. Furthermore, we are not persuaded by those decisions that we should modify the original penalty of dismissal imposed by the CHP, as we find them all distinguishable from the case before us. In Cortez Brown (1988) SPB Case No. 22834, an Employment Program Representative with the Employment Development Department

was dismissed after his admittedly serious drug and alcohol addiction manifested itself in excessive tardiness and absenteeism over a period of one year. The Board adopted an ALJ's Proposed Decision which modified the dismissal to a suspension based upon the ALJ's findings that Brown was a long-term employee with no prior adverse actions who had successfully rehabilitated himself. In Brown, the Board saw fit to give a second chance to a non-peace officer employee under specific circumstances it felt warranted that second chance. In a recent Precedential Decision, the Board held that non-peace officers' off-duty conduct is not subject to the same strict scrutiny applied to the conduct of peace officers. [See Charles Martinez (1992) SPB Dec. 92-09].

The peace officer cases cited by appellant are likewise distinguishable from the instant case. In Elliot Veal (1988) SPB Case No. 23854, the Board adopted an ALJ decision modifying the dismissal of a Correctional Officer to a four-month suspension. Although Veal was charged with purchase and use of cocaine, the record established marijuana use only. In reaching his decision to reduce the penalty imposed, the ALJ took note of the fact that the Department of Corrections had not dismissed other Correctional Officers who had used marijuana and concluded that Veal should not

be the victim of disparate treatment by the Department of Corrections.[1]

The ALJ's proposed decision in the case of Mark Thompson, SPB Case No. 27137, cited by appellant for its persuasive authority, was rejected by the Board. On June 11, 1992, the Board issued a non-precedential decision in that case sustaining the dismissal of a lifeguard for using cocaine.

In the Bobby J. Lee case, relied on by the ALJ and appellant, Lee obtained much of his marijuana from his wife without inquiring as to her sources. On one occasion, he accepted three to five joints from house guests. Nothing in the Bobby J. Lee decision suggests that Lee purchased marijuana himself or encouraged others to sell it to him. Thus, even assuming Bobby J. Lee had

[1]The case of Ron D. Stevens (1989) SPB Case No. 23002 was also cited by the appellant. The Board's decision in that case was successfully challenged in superior court after a consolidated hearing on cross writs of administrative mandate [Department of Corrections v. State Personnel Bd. (Monterey County Superior Ct. Case No. 89865) and Stevens v. Department of Corrections (Monterey Superior Court Case No. 90262)]. The SPB took a neutral role in that proceeding, filing only a notice of appearance. Before the SPB had had an opportunity to act on the superior court judgment and writ of mandate remanding the case to it for further findings, the trial court judgment was appealed to the Court of Appeal, Sixth Appellate District. [Stevens v. Department of Corrections (Case No. H008001)]. On February 6, 1972, the appellate court remitted the case back to superior court, concluding that the appellant had not exhausted his administrative remedies since the SPB had not had an opportunity to act on the earlier superior court remand. As of the date of the preparation of this Decision, the case has not been again remitted to the jurisdiction of the SPB. Since the case may again come before us, we decline to comment on our original decision in that case or to recognize it as persuasive authority.

precedential effect, the facts are distinguishable as that case involved personal marijuana use rather than solicitation of felonious activity.[2]

Appellant argues that "drug abuse is no different than alcohol abuse" and cites several non-precedential decisions as persuasive authority to support for his argument that suspension is the appropriate penalty for appellant's misconduct. We do not agree that drug abuse and alcohol abuse must or should be treated the same way. Alcohol use or abuse, in and of itself, however destructive it might be to the workplace, is not a crime. Had appellant's problem been alcoholism alone, a different result might have inured.

In short, we are neither compelled by prior precedent nor persuaded by the non-precedential authority cited to order a reduction in penalty from dismissal to suspension in this case.

Finally, appellant argues that we should consider his rehabilitation as a factor in assessing penalty. Although the Board has discretion to consider rehabilitation in assessing the "likelihood of recurrence" prong of the Skelly test for assessment of penalty [Department of Parks and Recreation v. State Personnel Board (Duarte) (1991) 133 Cal.App.3d 813], the harm to the public

[2]We note that the question of whether personal marijuana use by a peace officer warrants dismissal in all cases is not before us, and we do not decide that issue today.

service remains our "overriding concern" as mandated by Skelly. The court in Duarte specifically noted that post-disciplinary rehabilitation is not enough, in and of itself, to justify overturning a dismissal. (133 Cal. App.3d at 829). In the instant case, we feel that the fact that appellant participated in a rehabilitation program is insufficient to outweigh the harm and potential harm to the public service arising from appellant's misconduct. Based on the factual findings of the ALJ, neither do we find the circumstances surrounding the misconduct sufficient to justify overturning the dismissal.

CONCLUSION

For all of the reasons set forth above, the penalty of dismissal must be sustained.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The above-referenced adverse action of dismissal taken against GORDON J. OWENS is sustained.

2. This decision is certified for publication as a Precedential Decision (Government Code section 19582.5).

(Owens continued - Page 10)

STATE PERSONNEL BOARD*

Richard Carpenter, President

Alice Stoner, Vice-President

Clair Burgener, Member
Lorrie Ward, Member

*Member Richard Chavez did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 13, 1992.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board